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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 439

PANTZER LUMBER COMPANY,

*Petitioner,*

vs.

PHILIP B. FLEMING, Temporary Controls  
Administrator,

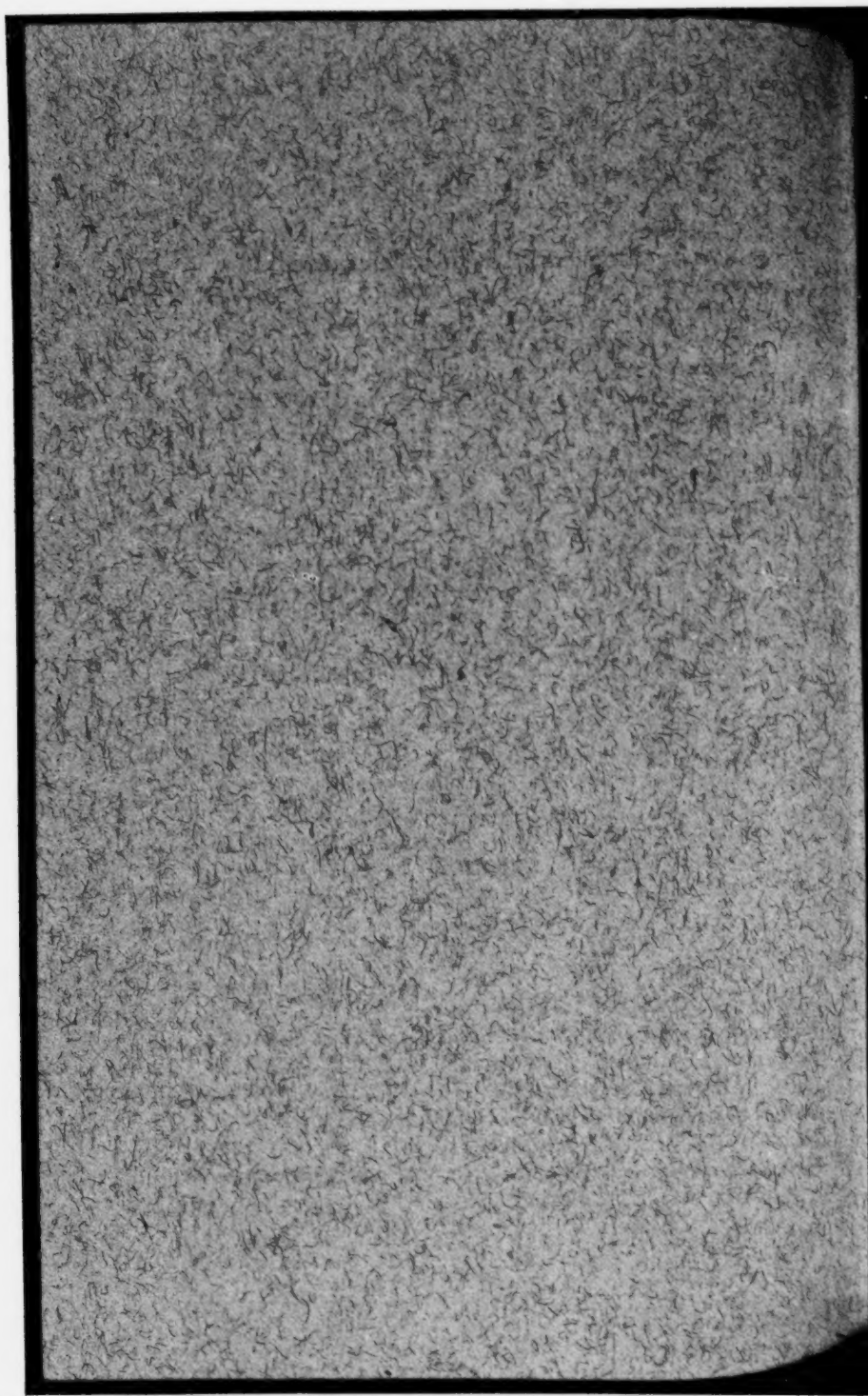
*Respondent*

PETITION FOR A WRIT OF HABEAS CORPUS TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT.

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November 12, 1947.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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No.

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PANTZER LUMBER COMPANY,  
*Petitioner,*

*vs.*

PHILIP B. FLEMING, TEMPORARY CONTROLS  
ADMINISTRATOR,  
*Respondent*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT.**

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered in this cause on June 13, 1947, which affirmed the judgment of the District Court of the United States for the Eastern District of Wisconsin.

**Summary Statement of the Matter Involved**

Petitioner is a retail lumber company doing business in Sheboygan, Wisconsin, and operates both a retail lumber distribution yard and an independent millwork shop (R. 11,

15). Petitioner purchased Sitka Spruce lumber from western lumber mills (R. 12), cut appropriate tent pole lengths from that lumber, and then processed the lengths into finished tent poles (R. 12-13). When the lengths were cut out, residue material was left. This residue was stored separately; ineffective efforts were at first made to sell it, as it was, in substantial quantities; and finally Petitioner was able to sell the residue, after it was remanufactured and processed, to a toy manufacturer (R. 13-14).

During this period, lumber was subject to price control under the Emergency Price Control Act of 1942, as amended, and to priorities control by the War Production Board. The Price Administrator brought suit for an injunction and for treble damages (R. 1-3), claiming that Petitioner's prices for this reworked residue material exceeded applicable maximum prices set by the Office of Price Administration. The Price Administrator's contention was that Petitioner's prices violated Maximum Price Regulation 215 and Maximum Price Regulation 290, taken together, in the following manner: MPR 215, relating to sales through distribution yards of softwood lumber, covers "sales out of distribution yard stock of any lumber or lumber products for which 'direct-mill' maximum prices are fixed in \* \* \* Maximum Price Regulation 290." M. P. R. 290 covers "all Sitka spruce (*picea sitchensis*) lumber, whether the grades, sizes and specifications are specifically named in the price tables in Article V or not." Article V contains certain price tables. Article II, Section 11, provides: "(a) If a seller wishes to sell a grade which is not specifically priced in the price tables, or wishes to make an addition for special workings, specifications, services, or other extras for which additions are not specifically permitted, he must apply to the Lumber Branch, Office of Price Administration, Washington 25, D. C., for a maximum price \* \* \* (d) On any sale involving a 'non-

listed' price or addition contemplated by paragraph (a) of this section, if the seller, for any reason, shall have failed to apply for approval of a maximum price under paragraph (a), the maximum price for the item sold shall be \$15.00 per 1000 board feet, which maximum price shall include all allowances or additions for grade, size, conditions, special workings, specifications, or other extras."

Petitioner did not apply for a special price for sales of the reworked residue material (R. 17), and the price charged by Petitioner was in excess of \$15.00 per 100 board feet as a base (R. 17; 81-92).

Petitioner contended that (a) the processed residue material was not "lumber", as was shown by a definition and interpretation of the War Production Board (R. 39) and therefore was not covered by the regulations; (b) an O.P.A. interpretation (R. 30) relied upon by the Price Administrator to prove the material to be lumber was not applicable, but if applicable, was clearly contrary to the practice in the trade, as shown by the consistent testimony of witnesses intimate with the lumber business, and therefore was in excess of the authority of the Price Administrator; (c) the Administrator's actions misconstrued the statute; (d) these residue materials, when processed and sold, were the product of Petitioner's millwork shop, and as such were not covered by regulations governing lumber distribution yards; and (e) the prices charged by Petitioner were within the maximum permissible prices set by any applicable O.P.A. regulation.

The trial court held that the processed residue material was lumber and was covered by price regulations, and that the prices charged were in excess of the maximum prices permitted; and the court awarded a judgment of \$8,292.94, one and one-half the amount of the asserted overcharge, together with costs (R. 95-102).

The Circuit Court of Appeals for the Seventh Circuit affirmed the judgment of the trial court, adopting the same reasons (R. 123-28).

### **Jurisdiction**

The decree of the District Court was entered on June 13, 1947. The mandate of the Circuit Court of Appeals was issued to the District Court on July 7, 1947. An order extending the time for filing a petition for certiorari until and including November 12, 1947, was issued by this Court on September 10, 1947. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. 347(a)).

### **Questions Presented**

- (1) Whether a person acting in accordance with a ruling of one Federal administrative agency may be penalized under an interpretation of another Federal agency, when the two Federal administrative rulings are in conflict.
- (2) Whether the O.P.A. interpretation is invalid as contrary to the accepted practice in the trade and therefore beyond the statutory authority of the Price Administrator.
- (3) Whether the operations of Petitioner are subject to the O.P.A. regulations relied upon below.
- (4) Whether the residue material was lumber within the meaning of the Price Control Act of 1942, as amended, and within the regulations of the Office of Price Administrator.
- (5) Whether the prices charged by Petitioner were in excess of the maximum prices permitted by O.P.A. regulations.

### **Reasons for Granting the Writ**

This cause presents an important question in the conflict of Federal administrative agencies—whether a person subject to the regulation of two Federal agencies, which have jurisdiction over the same subject matter, may be penalized under the regulations of one agency, when he has diligently observed the rulings of the other agency. The importance of this question transcends the existence of the two agencies here involved, and the duration of wartime controls, for our expanding governmental regulation often duplicates and overlaps itself even in time of peace. It is necessary that this Court prescribe how far reliance upon one of two conflicting administrative rulings will protect business men and others in the American economy. This Court has many times considered questions involving the impact of two or more Federal administrative agencies upon the same person or organization, but always, before this, the Court has been able to find that the various statutes meshed, or that only one of the agencies had jurisdiction over a particular activity. In this cause, there is no doubt that both agencies had jurisdiction and that the administrative rulings were in conflict.

Involved also are questions of the proper construction of an important Federal statute, the Emergency Price Control Act of 1942, as amended—a Federal statute which covered more persons and extended into more areas than any other law in the history of the United States. There are here involved questions of the authority of the Price Administrator to promulgate an interpretation not only in conflict with rulings of the War Production Board, but contrary to the established understanding in the trade, and at variance with the consistent and disinterested testimony of expert witnesses.

Finally, this cause involves rulings of the courts below,

on questions of law and questions of fact that are clearly wrong and should be reversed by this Court. While this Court does not ordinarily grant certiorari merely to correct error, there is no doubt that its jurisdiction is sufficient for this purpose; and in the exercise of its supervisory power over the lower Federal courts, this Court has not infrequently found it necessary to grant the writ so that demonstrable error will not prevail. The courts below have decided the questions of law and fact, concerning whether this processed residue material was lumber, whether it was within the pricing regulations, and whether the regulations would be valid if applied to this material, contrary to the evidence in the case, contrary to established authorities, and without competent support in the record. If this Court will not grant certiorari to reverse, manifest injustice will have been done.

### Conclusion

It is respectfully submitted that the petition for a writ of certiorari be granted.

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November 12, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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No.

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PANTZER LUMBER COMPANY,

*Petitioner,*

*vs.*

PHILIP B. FLEMING, TEMPORARY CONTROLS  
ADMINISTRATOR,

*Respondent*

---

**BRIEF IN SUPPORT OF PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SEVENTH CIR-  
CUIT.**

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**Opinions Below**

The opinion of the Circuit Court of Appeals (R. 123-28) is reported in 162 F. (2d) 276. The opinion of the United States District Court (R. 95-97) is reported in 70 F. Supp. 716 *sub. nom. Bowles v. Pantzer Lumber Company*.

**Jurisdiction**

The basis of the jurisdiction of this Court is set out in the accompanying petition for a writ of certiorari.

### **Statement of the Case**

A summary statement of the case is set out in the accompanying petition for a writ of certiorari.

### **Assignment of Errors**

The court below erred:

- (a) In holding that the residue material, when processed and sold, was "lumber" within the meaning of O.P.A. maximum price regulations;
- (b) In failing to hold that the O.P.A. interpretation relied upon by the Administrator was invalid because it was in conflict with the established usage in the trade;
- (c) In failing to hold that the W.P.B. order defining "lumber" correctly stated the meaning of that word;
- (d) In failing to hold that Petitioner conformed to an applicable W.P.B. order and therefore should not be held in violation of a conflicting governmental interpretation;
- (e) In holding that Petitioner's finishing mill operations were subject to the O.P.A. regulations covering lumber yards;
- (f) In holding that the prices charged by Petitioner were in excess of the maximum permissible prices set by O.P.A. regulations.

### **ARGUMENT**

#### **I**

**This Case Presents a Problem in the Conflict of Administrative Agencies Which Has Not Been But Should Be Settled by This Court**

It is established by the Rules of this Court that a conflict of decisions of circuit courts of appeals, or a conflict of a decision of a circuit court of appeals with a local court on

matters of local law, will be a reason for granting review on a writ of certiorari. Rule 38(a), (b). The case at bar presents a cognate question, but one much more far-reaching in its application to the American scene; it presents the issue of a conflict of administrative agencies having jurisdiction over the same person and over the same business, where the rulings of the agencies on the same point are mutually exclusive. Petitioner followed one ruling diligently. This proceeding represents an attempt to penalize Petitioner because another agency with jurisdiction asserts that Petitioner's actions were in violation of a contrary ruling.

As a retail lumber company, Petitioner during the war was subject to both the O.P.A. and the W.P.B. Normally these agencies operated within different spheres, and no conflict ensued. The present case, however, represents an unwitting divergence between the two agencies on the question of whether the residue material processed and sold by Petitioner is "lumber." W.P.B. Order No. L-335 (R. 39-40), issued June 23, 1944, specifically defined the word "lumber" to exclude the material in question here in stating:

" 'Lumber' means any sawed lumber of any species, size or grade, including round edge, rough, dressed on one or more sides or edges, dressed and matched, ship-lapped, worked to pattern, or grooved for splines, except: \* \* \* (v) items produced from lumber but not classified in the trade as lumber, such as box shook, *dimension stock*, *cut stock*, and millwork; and (vi) used lumber." (Italics added.)

The material here, by admission of Respondent's own witness (R. 21) is cut stock or dimension stock. This corresponds with the testimony of Petitioner's witnesses (R. 51, 57, 62, 67). The W.P.B. order was the order that Petitioner "lived by" for a considerable time (R. 39). But

Respondent has produced an interpretation of the Price Administrator (R. 30) which purports to define this material as lumber. It will be argued later in this brief that the O.P.A. interpretation is entitled to no weight; but assuming now, as the courts below assumed, that the O.P.A. interpretation is pertinent, we face a conflict of interpretations.

This Court has never resolved the question at bar, though it has decided many cases in which two or more administrative agencies asserted jurisdiction. In *Swift & Co. v. United States*, 316 U. S. 216, and *Southland Gasoline Co. v. Bayley*, 319 U. S. 44, the Court found the statutes were integrated, and that while both agencies in each case had jurisdiction, there was a clear boundary between the coverage of each agency. *Union Stock Yard Co. v. United States*, 308 U. S. 213, presented the dilemma of a company which was subject to *one* of two agencies, but not both, and this Court was called upon to determine which. *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, was a somewhat similar case in which a railroad was held entitled to an extraordinary legal remedy to obtain judicial determination whether it was subject to the Railway Labor Act or the National Labor Relations Act. Many more cases might be cited, but they fall into the same pattern: either (a) only one of the agencies has jurisdiction over the person or subject matter, or (b) both agencies have jurisdiction, but there is no overlap. Those cases are of no assistance here.

In an expanding and more complex American economy, the problem presented here will recur many times, the dilemma will worsen, unless this Court lays down a rule by which our growing administrative agencies must conduct themselves and on which business men can rely. If it will not help business men to follow the rulings of an agency

they "live with", which exercises an almost supervisory control over their daily practices, it is time they were told what to do to avoid future penalization by some more distant administrative relative in the executive branch of the government. Essentially this is a problem in the dynamics of a regulated private enterprise economy, such as we have here in the United States, and this Court should aid both business and government to avoid the "unfortunate" situations, appearing so often in the press during the recent war, where penalties may be inflicted upon a person who has obeyed to the best of his ability that amorphous creature—"the Government."

## II

### **The Material Sold by Petitioner Was Not "Lumber"**

A focal point of dispute in this case is whether the material sold by Petitioner was "lumber." If it was not, there was no violation of any governmental regulation (R. 6). If it was, there still may be no violation of regulations, since Petitioner contends that the milling operations involved here were not covered by the regulations relied upon by the Price Administrator.

Petitioner contended below that the residue material, left over after the processing of tent poles from lumber, when processed further and sold to a toy manufacturer, was not lumber but was what is universally known in the trade as "dimension stock" or "cut stock," generally sold as moulding. This was the testimony of Petitioner's president (R. 42, 48); it is the definition of the War Production Board (R. 39); it was the testimony of four expert witnesses (R. 51, 57-59, 61, 67); and more witnesses were dispensed with in order to avoid repetition (R. 59).

Against this proof, Respondent offered only two things:

(a) the testimony of a single witness employed by O.P.A. (R. 18), not experienced in Petitioner's field of operations (R. 20), and (b) an O.P.A. interpretation of general application (R. 30).

It was conceded by both the trial court (R. 96) and the court below (R. 126-27) that the residue material was not included within the language of O.P.A. regulations. The court below expressly found that "Notwithstanding the detailed specificity of the Regulations, it happened that the particular wood product under consideration was not covered." Yet the trial court, relying upon an administrative interpretation which it said was "not plainly erroneous" (R. 97), and the court below, apparently relying only upon the fact that "the country was at war" (R. 127), held the material to be lumber within the coverage of these maximum price regulations.

This Court does not ordinarily issue a writ of certiorari merely to correct error. Yet the Court's jurisdiction on certiorari patently extends to "any case," 28 U. S. C. 347(a), and the statute vests in the Court "a comprehensive and unlimited power" to review the decision of a circuit court of appeals. *Forsyth v. Hammond*, 166 U. S. 506. The Court has often exercised a supervisory power to correct palpable error in the decision of a court of appeals, where an important Federal statute is involved, as was the case in *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publisher Co.*, 293 U. S. 268, *Buffum v. Peter Barceloux Co.*, 289 U. S. 227, and *Reynolds v. United States*, 292 U. S. 443; it has granted certiorari to remedy manifest injustice, as in *Southern Railway Co. v. Walters*, 284 U. S. 190, *Stringfellow v. Atlantic Coast Line Co.*, 290 U. S. 322, *McCandless v. United States*, 298 U. S. 342, and *Ormsby v. Chase*, 290 U. S. 387. The exercise of this Court's supervisory power is even clearer in criminal cases, as witness

its granting of certiorari in *Alford v. United States*, 282 U. S. 687, *Husty v. United States*, 282 U. S. 694, *Escoe v. Zerbst*, 295 U. S. 490, and *Shepard v. United States*, 290 U. S. 96, a category of cases close to the punitive aspects of the case at bar.

Neither the trial court nor the court below made any findings, based upon evidence, that the material here was lumber. In both cases the courts seemed to have been moved by the thought that this material *should* have been covered by the regulations, and ignored the fact that it was not covered. The undisputed facts reveal the following situation.

A single board going through a moulding machine was cut into a tent pole, with some material left over (R. 13). Since both tent poles and boards varied in size, the residue material varied in size (R. 12-13). The tent poles which emerged were concededly not lumber, though further processing was necessary to finish them for final use (R. 26). The residue material which, like the portion cut as a tent pole, had also been cut and moulded from the original board, also underwent some further processing to fit it for final use (R. 22). There was no difference in the two portions, before or after going through the moulding machine, except of course as to the final use to which they would be put. Yet O.P.A.'s only witness—a member of the O.P.A. staff, not an independent expert—admitted that the tent poles were *not* lumber but contended that the residue material emerging at the same time *was* lumber (R. 22). No other witness was produced to substantiate this extraordinary claim, which borders on a schizophrenic analysis of identical material. The O.P.A. witness appears to have taken the position that no matter what processing wood has undergone, it is still lumber if any further processing is contemplated (R. 22). That this is nonsense is shown by

the testimony of every other witness who appeared, and by the W. P. B. definition. It is nonsense as applied in this very case to the tent poles.

The *only other* portion of the flimsy foundation erected to call this residue material "lumber" is an O.P.A. interpretation entitled "Mill Trims" (R. 30). It is found in the official O.P.A. Service (Lumber Desk Book, p. 1051) under the heading of "Interpretations of General Applicability" and is merely a blunderbuss attempt to blanket all short lengths into the category of lumber. It far exceeds the meaning of the term "mill trims" as commonly used in the trade to mean the irregular or defective ends cut off pieces of lumber which are themselves irregular.

No doubt the pattern for the weight given to interpretations of administrative regulations was set by this Court in *Bowles v. Seminole Rock and Sand Co.*, 325 U. S. 410, 414, where it was said that such an interpretation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." But the interpretation here, while entitled to weight in cases where it is correctly applied—as in the situation of pieces recognized in the trade as mill trim—is clearly erroneous when in conflict with the consistent testimony of all the competent witnesses produced, with the established practice in the trade, and with an interpretation of the W.P.B. Administrative interpretations have their recognized limitations, and the "great weight" accorded them has been expressly said by this Court to apply only to the extent of "properly supported findings of fact." *Social Security Board v. Nierotko*, 327 U. S. 358, 369. It is not enough for an agency to issue an interpretation and insist that the interpretation is applicable in all cases; the agency must show that the interpretation applies to the particular case and is supported by the facts of that case. No such burden has been met

here, and the mere existence of such an interpretation has no relevance to the question of whether it is applicable.

The material sold in this case was not mill trim, to which the interpretation is applicable. It may or may not have been mill trim after it emerged from the moulding machine; but when processed further for sale, it became "dimension stock" or "cut stock", and was such *when sold* (R. 44, 51, 57, 61, 67). This is the consistent meaning in the trade, as shown by the witnesses and as recognized by the W.P.B. definition. Of course the maximum price regulations apply to material when sold, not to material at some previous time in its history. The interpretation is thus either not applicable, or, if applied, is void for conflict with the evidence, the W.P.B. definition, and the established usage in the trade.

### III

#### **Petitioner's Finishing Mill Operations Were Not Subject to O. P. A. Regulations Covering Lumber Yards**

The two regulations involved here, M.P.R. 215 and M.P.R. 290, do not cover the operations of Petitioner in this case.

M.P.R. 215 covered "sales out of distribution yard stock" for which "direct-mill" maximum prices were fixed in certain regulations, including M.P.R. 290 (See M.P.R. 215, Article I, Section 3, subsections (a) and (b)). M.P.R. 290 applied to "Sitka Spruce lumber for direct-mill shipment" (M.P.R. 290, Sections 1 and 3).

The material involved here was not the subject of direct-mill shipment from distribution yard stock, and the decisions below merely reflect a complete misunderstanding of the nature of Petitioner's activities. The courts below confused two separate operations of Petitioner—(1) a retail lumber distribution yard, and (2) a finishing mill (or millwork shop), which is "an entirely different operation"

of Petitioner (R. 15). The O.P.A. regulations covered sales from the first operation, but not at all from the second, which is the operation producing the residue material in this case. The confused merger of these two activities began with counsel for Respondent in the trial court (R. 15), when he received an answer not at all to his liking, and was perpetuated in the decisions of the courts. They have confused the word "mill" wherever it appears by assuming that all mills are sawmills or planing mills, which are expressly covered in Section 3 of M.P.R. 290. But a finishing mill, which processes lumber into a particular product, is of a wholly different class than a sawmill, which produces raw lumber; and these lumber regulations obviously apply only to mills producing lumber. A millwork shop, as here, is not a lumber yard; its products are manufactured goods, not lumber; and its sales are therefore not covered by *these* regulations.

#### IV

#### **Petitioner's Prices Did Not Exceed the Maximum Prices Permissible under the Regulations**

Perhaps the worst error of all those made by the court below was that it assumed that if the material here was lumber, and if the regulations applied to these operations of Petitioner, then the maximum base price permissible was \$15,000 per thousand board feet (R. 127). The court below rejected Petitioner's argument that its sales were covered by Condition 20 of Table 5 of M.P.R. 290, which concededly allowed maximum prices higher than those charged by Petitioner, and accepted Respondent's argument that Table 8, not Table 5, applied.

Table 5 is entitled "Sitka Spruce Finish and Clears." Table 8 is entitled "Sitka Spruce Shop." Since the lumber purchased by Petitioner was shop grade lumber (R. 12,

31-32), the court below rather cavalierly held that the material here came within Table 8 and thus did not obtain the pricing benefits of Table 5 (R. 127-28).

The court's egregious error on this point consisted of confusing the material purchased and the material sold. It is true that Petitioner itself purchased shop grade lumber, which roughly may be described as fairly clear lumber with a few defects intermittently scattered (R. 12, 32). But Petitioner then cut out the defects (which are not usable) and thus obtained "clear cuts" from the original shop lumber (R. 12, 32). The material in this case, the subject of this litigation, was all processed according to the ultimate purchaser's requirement that it "run clear," and was obtained *in toto* from the clear cuts of Petitioner (R. 32-33). Thus regardless of what Petitioner purchased, what Petitioner *sold* was Sitka Spruce clears, within the meaning of Table 5.

Using the special pricing provisions of Table 5, the maximum price permissible in this case can be shown to be \$118.32 per thousand board feet, rather than the \$15.00 arbitrary figure adopted by the court below. Since Petitioner's prices averaged \$100 and less (R. 31, 81-92), its prices were considerably below the maximum prices that it could have charged, if the material be assumed to be lumber and within the scope of the O.P.A. regulations. The court below made the most elementary of errors in confusing Petitioner's own purchases and Petitioner's sales.

### Conclusion

The judgment of the court below, even if it were correct, would represent merely one attempted solution to a complex problem that ought to be settled by this Court, in simple justice to a complicated economy. It ought to be settled by this Court as an exercise of this Court's super-

visory power over the varied and often conflicting branches of government. But the judgment of the court below is not correct; it bears demonstrable error on its face, and ought to be reversed by this Court so that grievous injustice will not have been done in this case.

Petitioner therefore urges that the petition for certiorari be granted.

Respectfully submitted,

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